Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1421

DESIGN & MANUFACTURING CORPORATION,
Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), and its LOCAL 2042, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Design & Manufacturing Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding[1] on December 17, 1979.

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1. Respondents in this proceeding, other than those named in the caption, are Wendell Pope, Robert Curtis, Russell Klingman, Charles C. Jones, Diana J. Pickering, Melvin Adams and Charles Dale, individually and as members and representatives of the Richmond Unit of Local 2042 of International Union, United Automobile, Aerospace and Agricultural Implement Workers (UAW), and as representatives of the class of striking employees of Design & Manufacturing Corporation.

OPINION BELOW.

The opinion of the court of appeals, not yet officially reported, appears unofficially at 103 LRRM 2064 and is reproduced in the Appendix hereto. The opinion of the district court, an unreported opinion, is also reproduced in the Appendix.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 17, 1979. Petitioners determined not to file a petition for re-hearing before that court. This petition for certiorari was filed within ninety (90) days of the entry of the judgment of the court of appeals on December 17, 1979. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether a United States district court has jurisdiction to issue an injunction and contempt citation, pending arbitration, to enforce a specific promise not to engage in a sympathy strike where the employer and the union have agreed that certain conditions must exist before a sympathy strike is permitted; where there is a dispute between the employer and the union as to the existence of those conditions; and where said dispute is subject to final and binding arbitration.

STATUTORY PROVISIONS INVOLVED.

Due to the length of the statutory provisions involved they are set out in full in the Appendix hereto.

Norris-LaGuardia Act, Sections 4 and 7
United States Code, Title 29:

§ 104 Enumeration of specific acts not subject to restraining orders or injunctions.

§ 107 Issuance of injunction in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings.

Labor-Management Relations Act of 1947, as amended, Sections 203(d) and 301(a)-(c)

United States Code, Title 29:

§ 173(d) Functions of Service—Use of conciliation and mediation services as last resort.

§ 185(a)-(c) Suits by and against labor organizations.

STATEMENT OF THE CASE.

This case involves a United States district court decision that refused to modify a preliminary injunction prohibiting strike activity by respondents Local 2042 and other individual respondents and held certain respondents in contempt of said preliminary injunction. The jurisdiction of the district court was invoked under 29 U. S. C. § 185 (Section 301 of the Labor-Management Relations Act of 1947) as an action to enforce provisions of a collective bargaining agreement.

I.

EMPLOYERS AND COLLECTIVE BARGAINING RELATIONSHIPS INVOLVED.

Petitioner Design & Manufacturing Corporation is engaged in the manufacture of automatic dishwashers at its plant located in Richmond, Indiana (hereinafter "Richmond"). Design & Manufacturing Corporation is also engaged in the manufacture of automatic dishwashers at plants located in Connersville, Indiana (hereinafter "Connersville"). Connersville is approximately 35 miles away from Richmond.

Employees of Richmond are represented by the Respondents International Union (UAW) and its Local 2042 (hereinafter "Union"). The employees of Connersville are represented by the International Union (UAW) and two separate units of its Local 151. The employees of Richmond and the employees of Connersville are covered by different collective bargaining agreements with different expiration dates.

The current collective bargaining agreement between Richmond and the Union governing the employment of the employees of Richmond became effective on February 28, 1978,

and will not expire until 1980. The collective bargaining agreement contains a grievance procedure. The grievance procedure is contained in Section 4.0 of the collective bargaining agreement. It provides, in pertinent part:

> "A grievance is defined to mean any question or controversy between the Company and the Union, or between the Company and any employee or employees covered by this agreement, concerning . . . any disagreement arising out of the application, interpretation or enforcement of the provisions of this agreement."

Step 4 of the grievance procedure provides that if a grievance, as defined above, is not satisfactorily settled in the first three steps of the grievance procedure, it is to be submitted to final and binding arbitration.

The collective bargaining agreement contains a broad no-strike clause prohibiting strikes generally and also a clause specifically addressed to a type of sympathy strike. The latter clause reads:

> *Section 10.2.* In the event of a strike by the Union at either of the Company's plants in Connersville, Indiana, the Union will not strike or picket in any manner the Richmond plant, nor will employees in the Richmond unit support the strike in Connersville by any picketing, strike or work stoppage of any kind. However, this limitation shall not apply in the event that the Company brings any production from either of the Connersville plants to Richmond which would necessitate hiring new employees at the Richmond plant during a lawful strike at either of the Connersville plants.

A virtually identical reciprocal provision is contained in the collective bargaining agreement between Connersville and the D&M unit of Local 151, UAW. (App. p. 43)

II.

PRELIMINARY INJUNCTION ISSUED IN SEPTEMBER, 1978.

In September of 1978, members of the Union struck Richmond. The strike was over grievances subject to arbitration under the governing collective bargaining agreement and was in clear violation of the agreement's no-strike clause. After a hearing on September 8, 1978, the United States District Court for the Southern District of Indiana issued a preliminary injunction which contained the following order against the Union:

> [They] are hereby ordered and directed to cease picketing and causing or continuing the strike and concerted stoppage of work at the plaintiff's factory in Richmond . . . and they are hereby further *ordered and directed to utilize the grievance and arbitration procedures contained in said collective bargaining agreement for the settlement of all disputes.* (emphasis added)

The injunction was issued in conformity with the holding of *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U. S. 235 (1970), which announced an exception to the prohibition against injunctions by federal courts in labor disputes found in Section 4 of the Norris-LaGuardia Act (29 U. S. C. § 104). The members of Local 2042 returned to work in September of 1978.

III.

STRIKE BEGINS IN CONNERSVILLE.

A collective bargaining agreement between the D&M unit of Local 151, UAW and Connersville expired on September 16, 1978. Employees at Connersville went on strike. The strike by the International Union (UAW) and its Local 151 in Connersville was a bona fide, legal and primary strike.

IV.

REQUEST TO MODIFY PRELIMINARY INJUNCTION TO PERMIT SYMPATHY STRIKE.

On October 2, 1978 the Union and individual respondents filed a motion to clarify the preliminary injunction entered on September 8, 1978, seeking to add language to the preliminary injunction exempting from its coverage any and all work stoppages which might occur in situations covered by Section 10.2 of the collective bargaining agreement. The motion to clarify the injunction was based on a contention that such activity would be a sympathy strike which, whether in violation of the collective bargaining agreement's no-strike clause or not, was not enjoinable under this Court's decision in *Buffalo Forge Company* v. *United Steelworkers of America,* 428 U. S. 397 (1976).

V.

SYMPATHY STRIKE BEGINS.

On October 4, 1978, before a ruling on the Union's motion to clarify, Richard Stevens, the unit chairman of the D&M unit of Local 151 in Connersville, decided to establish a picket line at Richmond. Stevens believed that work had been transferred from Connersville to Richmond and that Richmond had hired additional employees to handle said work. Stevens' belief was based upon information received by him from one member of Local 2042. (App. pp. 8-11, 15)

On October 5, 1978, members of the International Union (UAW) and the Connersville Local 151 established a picket line at the entrances to Richmond and requested the Richmond employees who were members of the Union not to go to work. The pickets told the employees at Richmond that Connersville

work had been transferred to Richmond and additional employees had been hired to perform the work. (App. p. 12) Richmond denied that work had been transferred from Connersville to Richmond and that it had hired new employees to perform such work.

Virtually all of the employees of Richmond honored the picket line on October 5, 1978. They continued to honor the picket line on October 6 and 7, 1978. The Union did not advise the Richmond employees to return to work.

VI.

CONTEMPT PROCEEDINGS AGAINST RESPONDENTS.

On October 6, 1978, Richmond filed a petition requesting the district court to find the striking employees of Richmond in civil contempt of the district court's preliminary injunction of September 8, 1978, and seeking appropriate sanctions. On October 6, 1978, a hearing was held pursuant to this petition.

At the hearing the individual respondents represented to the district court that they had ceased working in response to the picket line set up by members of the International Union (UAW) and the Connersville Local 151, that they were in sympathy with the pickets and that they had a right to honor the picket line pursuant to Section 10.2 of the collective bargaining agreement between Richmond and the Union. Richmond denied that work had been transferred necessitating the hiring of new employees in Richmond.

Connersville Local 151 Unit Chairman Stevens testified that if it was demonstrated that work had not been moved from Connersville to Richmond and that employees had not been hired at Richmond to perform such work he would end the picketing. (App. p. 9)

During the contempt proceedings Richmond offered in open court immediately to submit any question arising under Section 10.2 of its collective bargaining agreement to expedited binding arbitration, without briefs. (App. pp. 14-15)

VII.

THE DISTRICT COURT'S DECISION.

The district court held that the strike involved in the instant case was distinguishable from the sympathy strike in *Buffalo Forge, supra,* and was proscribed by the terms of its preliminary injunction of September 8, 1978. The district court refused to modify that injunction to permit the members of the Union to honor the picket line established by the International Union (UAW) and its Local 151.

The district court found that Section 10.2 of the collective bargaining agreement was a specific promise not to engage in this particular strike unless certain conditions were determined to exist. The district court held that said determination must be made before the Union could engage in the strike and that said determination must be made by an arbitrator if the parties were in dispute over the existence of the conditions. The district court concluded that the strike could be enjoined pending arbitration of said dispute and entered an order denying the Union's motion for modification of its preliminary injunction, finding the Union and the named individual respondents in contempt of court and directing the parties to proceed immediately to expedited arbitration.

Respondents appealed the district court's order refusing to modify the preliminary injunction and holding respondents in contempt of court to the United States Court of Appeals for the Seventh Circuit. The jurisdiction of the court of appeals was invoked pursuant to 28 U. S. C. § 1292(a)(1). The court of appeals reversed the district court, basing its decision on *Buffalo Forge, supra.*

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION BELOW INCORRECTLY INTERPRETED AND APPLIED FEDERAL LABOR POLICY IN CONFLICT WITH THIS COURT'S HOLDINGS IN UNITED STEELWORKERS v. WARRIOR & GULF NAVIGATION CO.; BOYS MARKETS, INC. v. RETAIL CLERKS UNION, LOCAL 770; GATEWAY COAL CO. v. UNITED MINE WORKERS; AND BUFFALO FORGE CO. v. UNITED STEELWORKERS OF AMERICA.

Consideration of the issues raised in this petition requires a brief review of the development of federal labor policy over the past several decades.

At the beginning of the labor movement in the United States strikes were not uncommon. Strikes were often violent and employers frequently resorted to the courts to enjoin strike activity. The propensity of federal courts to grant injunctions prohibiting strikes led to the enactment in 1932 of the Norris-LaGuardia Act, Section 4 of which (29 U. S. C. § 104) provides that federal courts shall not issue injunctions in labor disputes. Following passage of the Norris-LaGuardia Act, federal court issuance of injunctions prohibiting strikes ceased almost entirely.

By passage of the Labor Management Relations Act in 1947, Congress articulated a policy favoring resolution of labor disputes by methods agreed upon by the parties to said disputes. Section 203(d) of that Act (29 U. S. C. § 173(d)) provided, in pertinent part, that:

> [F]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

In the 1960's, labor dispute arbitration was recognized by this Court as the favored dispute resolution mechanism of federal labor policy. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). (Collectively these cases are referred to as "The Steelworkers' Trilogy.") The Steelworkers Trilogy announced the strong federal labor law policy in favor of using arbitration to settle labor disputes rather than strikes with their resulting industrial strife.

In 1970, this Court reconciled the duty to arbitrate, promises not to strike and the Norris-LaGuardia Act's prohibition of injunctions in labor disputes. In the case of *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770, supra,* this Court held that where a no-strike clause and an agreement to submit a dispute to binding arbitration were in effect, a union was not permitted to strike to attempt to force a resolution of an arbitrable dispute and short-circuit the arbitration process. This Court held that if a union did strike in an attempt to short-circuit the arbitration process, the strike could be enjoined pending arbitration notwithstanding the Norris-LaGuardia Act's prohibition against injunctions in labor disputes, so long as the traditional factors necessary for the issuance of an injunction were found to exist.

In 1974, this Court decided *Gateway Coal Co.* v. *United Mine Workers,* 414 U. S. 368 (1974). That case held that where an arbitration clause covered a dispute so that the dispute was subject to final and binding arbitration, a no-strike clause which was coterminous with the duty to arbitrate would be implied in the collective bargaining agreement and that an injunction to halt a strike over an arbitrable dispute could issue.

In 1976, this Court decided *Buffalo Forge Co.* v. *United Steelworkers of America, supra.* In that case, one union represented two separate units of one employer. One of the units

represented by the union had successfully concluded its collective bargaining negotiations with the employer and its agreement contained a broad no-strike clause, but one which did not specifically refer to sympathy strikes. The other unit of employees represented by the union was unable to agree to terms with the employer and therefore engaged in a strike to enforce its economic demands. The unit which had already reached agreement with the employer honored the picket line of the striking unit. The employer sued the unit which was under contract and contended that the no-strike clause prohibited the honoring of the striking unit's picket line.

This Court held that the strike involved in that case was not enjoinable under the principle established in *Boys Markets, supra.* This Court analyzed the development of the law set forth above and found that the strike in *Buffalo Forge, supra,* was not *over* an arbitrable dispute between the strikers and the employer. This Court stated:

> The district court found, and it is not now disputed, that the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue underlying it were subject to the settlement procedures provided by the contract between the employer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain. (emphasis in original)

428 U. S. at 407-08

Therefore, this Court concluded that the only issue which could be arbitrated was whether the scope of the no-strike clause included the sympathy strike; this Court held that the district court was without jurisdiction to issue an injunction since that issue was for an arbitrator to decide.

The above abbreviated history shows that federal labor policy is to enforce agreements to use arbitration to resolve questions which arise under collective bargaining agreements between employers and unions and, when necessary, to specifically enforce promises not to strike by enjoining strikes which have the effect of violating the agreement to arbitrate. *Buffalo Forge, supra,* merely teaches that an injunction may not issue where the scope of the promise not to strike is the issue to be arbitrated.

In the instant case it is undisputed that the picket line of the D&M Unit of Local 151 was set up at Richmond because of a contention that work had been moved from Connersville to Richmond necessitating the hiring of new employees in Richmond, and that the strike was in response to that picket line. The employer (Richmond) denied that such movement of work and hiring of employees had taken place. It is undisputed that the fact question whether such movement of work and hiring of employees had taken place was an arbitrable dispute under the collective bargaining agreement between Richmond and the Union. Therefore, this strike was *over* a dispute that is arbitrable under the agreement notwithstanding the fact that it was *also* a sympathy strike.

Boys Markets, supra, and *Gateway Coal, supra,* authorize injunctive relief where a strike is over a dispute the parties have agreed to arbitrate. Unlike the situation in *Buffalo Forge, supra,* the issue underlying the instant strike was "subject to the settlement procedures provided by the contract between the employer and respondents." The decision of the court of appeals is in conflict with the holdings of those three cases since it holds that injunctive relief is prohibited in these circumstances.

The decision of the court of appeals is in conflict with the federal labor policy favoring arbitration since it extends, rather than applies, *Buffalo Forge, supra.* Richmond and the Union specifically agreed that the strike which occurred was not to occur unless certain conditions existed. The question to be arbitrated was *not* the scope of the promise not to strike as

was the case in *Buffalo Forge, supra;* the question to be arbitrated was whether the conditions existed under which the agreement permitted this strike to occur.

The effect of the decision of the court of appeals is to make it virtually impossible for a union and an employer to agree to effectively prohibit sympathy strikes and isolate labor disputes at one plant of a multi-plant employer.[2] This effect was not intended by *Buffalo Forge, supra.* The court of appeals' decision denies specific enforcement of a promise not to strike where the arbitration of a dispute the parties have agreed to arbitrate will resolve the issue underlying the strike. The decision is inconsistent with federal labor policy favoring arbitration.

2. Specific enforcement of the correlative promises to arbitrate and not to strike has been recognized as the only effective means of remedying breaches of no-strike commitments. In *Boys Markets, supra,* the Court stated:

> While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union.

398 U. S. at 248

This Court elaborated on the statement quoted above in footnote 17 of its opinion in *Boys Markets, supra,* stating:

> As the neutral members of the A.B.A. committee on the problems raised by Sinclair noted in their report:
>
> > "Under existing laws, employers may maintain an action for damages resulting from a strike in breach of contract and may discipline the employees involved. In many cases, however, neither of these alternatives will be feasible. Discharge of the strikers is often inexpedient because of a lack of qualified replacements or because of the adverse effect on relationships within the plant. The damage remedy may also be unsatisfactory because the employer's losses are often hard to calculate and because the employer may hesitate to exacerbate relations with the union by bringing a damage action. Hence, injunctive relief will often be the only effective means by which to remedy the breach of the no-strike pledge and thus effectuate federal labor policy." A. B. A. Sinclair Report 242.

398 U. S. at 248, n. 17

II.

THE DECISION BELOW IS DIRECTLY IN CONFLICT WITH THIS COURT'S HOLDING IN GATEWAY COAL CO. v. UNITED MINE WORKERS.

In the instant case, the Union claimed it had determined that the circumstances permitting the sympathy strike existed; Richmond contended they did not exist. *Gateway Coal, supra,* involved circumstances similar to those of the present case. In that case, a clause of the applicable collective bargaining agreement permitted work stoppages (strikes) if certain conditions obtained. The clause provided:

> The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the lives and bodies of the mineworkers, it shall report its findings and recommendations to the management. In those special circumstances where the committee believes an immediate danger exists and the committee recommends that the management remove all mineworkers from the unsafe area, the operator is required to follow the recommendation of the committee.
>
> If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions for settlement of disputes.

414 U. S. at 383

In *Gateway Coal, supra,* the union engaged in a work stoppage because the union claimed an immediate danger to the safety of the mine employees existed. The employer contended that the union was obligated to arbitrate the issue whether an immediate danger existed. The union contended that it had made

the determination and that its determination was all the contract called for and that therefore the work stoppage was permitted by the contract clause.

This Court stated that under the union's construction of the contract clause, the union committee's good faith belief in the existence of an immediate danger, no matter how unfounded, was conclusive and management had no effective recourse against arbitrary and capricious decisions by the committee. This Court went on to state:

> In any event, whether the union properly invoked the provision is a substantial question of contractual interpretation, and the collective bargaining agreement explicitly commits to resolution by an impartial umpire all disagreements 'as to the meaning and application of this agreement'. (footnote omitted)

414 U. S. at 384

Addressing an argument that, in addition to the contract clause, Section 502 of the Labor-Management Relations Act made a refusal to work because of a good faith apprehension of physical danger protected activity and not enjoinable even where there is an applicable comprehensive no-strike clause, this Court stated that the subjective determination by a union of a significant factual question arising under an agreement should not be considered conclusive. The Court stated:

> If the courts require no objective evidence that such conditions actually obtain, they face a wholly speculative inquiry into the motives of the workers. . . . *Absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment however honest it may be.* We agree with Judge Rosen that a union seeking to justify a contractually prohibited work stoppage under Section 502 must present 'ascertainable, objective evidence supporting its conclusion that an ab-

> normally dangerous condition for work exists.' (Citation omitted, emphasis added.)

414 U. S. at 386-88

This Court concluded that Section 502 did not deprive the district court of the authority to enforce the contractual no-strike obligation by an injunction and held that injunctive relief was appropriate in that case under the equitable principles set forth in *Boys Markets, supra.*

In the instant case, the Union contends that Section 10.2 gave it the right to engage in this strike. However, Section 10.2 calls for a determination to be made as to whether Richmond accepted work normally performed by employees of Connersville and hired additional employees at Richmond to perform such work.

The Union claimed it had made that determination and thus it was permitted to engage in the strike. Said determination by the Union is subjective as was the union's determination in *Gateway Coal, supra.* The Union's subjective determination that the circumstances permitting the strike existed was disputed by Richmond. The dispute between Richmond and the Union concerning the existence of these circumstances was an arbitrable dispute and the strike was a result of this dispute. The decision below failing to enjoin the strike pending arbitration of this question is in conflict with *Gateway Coal, supra.*

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-2478

DESIGN & MANUFACTURING CORPORATION,
Plaintiff-Appellee,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), and its LOCAL 2042, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 78-579-C—S. Hugh Dillin, *Judge.*

ARGUED JUNE 11, 1979—DECIDED DECEMBER 17, 1979

Before CUMMINGS and TONE, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* Finding that a union's sympathy strike was over an issue subject to arbitration under the terms of the collective bargaining agreement between the parties, the district court refused to modify its previously entered preliminary injunction to allow the sympathy strike, and held the defendant union and several individuals in contempt of

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

that injunction. Because we find that the only dispute between the parties related to the applicability of the no-strike clause of the collective bargaining agreement, *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976), requires us to reverse the order of the district court.

The relevant facts are not in dispute. Design & Manufacturing Corporation (D & M) manufactures automatic dishwashers at plants located in Richmond, Indiana, and in Connersville, Indiana. Its employees at the Richmond plant are represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local 2042 (Local 2042); the employees at the two Connersville plants are represented by separate units of Local 151 of the same International Union. The employees of D & M—Richmond and the employees of D & M—Connersville are covered by different collective bargaining agreements with different expiration dates.

The current collective bargaining agreement for the employees at the Richmond plant between D & M and Local 2042 became effective on February 28, 1978, and will not expire until 1980. The agreement contains a four-step grievance procedure ending in arbitration. The contract also contains the following no-strike clause:

SECTION 10.0: STRIKES AND LOCKOUTS

Section 10.1. The Union agrees that it will not engage in, initiate, authorize, sanction or support any strike, slowdown, stoppage of work or other interference with production or the quality of the product during the life of this Agreement. The Company agrees that there shall be no lockouts during the life of this Agreement.

Section 10.2. In the event of a strike by the Union at either of the Company's plants in Connersville, Indiana, the Union will not strike or picket in any manner the Richmond plant, nor will employees in the Richmond unit support the strike in Connersville by any picketing, strike

or work stoppage of any kind. However, this limitation shall not apply in the event that the Company brings any production from either of the Connersville plants to Richmond which would necessitate hiring new employees at the Richmond plant during a lawful strike at either of the Connersville plants. [App. 42]

In early September, 1978, Local 2042 struck the D & M plant at Richmond. D & M promptly instituted this action in the district court seeking injunctive relief. After a hearing, Judge Dillin found that the strike was over arbitrable grievances, enjoined the strike, and ordered the Local 2042 to utilize the grievance and arbitration procedures contained in the collective bargaining agreement. The preliminary injunction was entered on September 8, 1978, and the members of Local 2042 returned to work in compliance with the injunction.

The collective bargaining agreement between Local 151 and D & M covering the employees at D & M's Connersville plants expired on September 16, 1978. Thereafter, the Connersville employees went on strike. There is no question that the Local 151 strike at Connersville was a bona fide, legal, and primary strike against D & M.

On October 2, 1978, Local 2042 filed a motion to clarify the previously entered preliminary injunction, seeking to add language to it exempting from its coverage any and all work stoppages which might occur in situations covered by Section 10.2 of the collective bargaining agreement. Before the motion could be heard, the unit chairman of Local 151 decided on the basis of information he had heard concerning the movement of work from Connersville to Richmond to establish a picket line at D & M's Richmond facility. On October 5, 1978, members of Local 151 established a picket line at the entrances to D & M—Richmond, and told employees at Richmond that Connersville work had been transferred to Richmond and additional employees had been hired to perform the work. All of the employees of D & M—Richmond honored the picket line.

On October 6, 1978, D & M petitioned the district court to find Local 2042 and its striking members in contempt of the September 8 preliminary injunction because its members honored the Local 151 picket line. At the conclusion of a hearing, the district court held that Local 2042's sympathy strike was proscribed by the terms of the September 8 preliminary injunction. Consequently, the district court refused to modify the injunction to permit Local 2042 to honor Local 151's picket line at D & M—Richmond, and found Local 2042 and the named individuals in contempt.

In *Boys Markets* v. *Clerks Union,* 398 U. S. 235 (1970), the Supreme Court carved out a narrow exception to the broad statutory prohibition which prevents a federal court from enjoining strikes in a labor dispute. Concluding that the prohibition contained in § 4 of the Norris-LaGuardia Act, 29 U. S. C. § 104, must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration, the Court held that a strike was enjoinable where the collective bargaining agreement between the disputants contained a provision for the mandatory submission of a grievance to arbitration, and where the union's violation of a no-strike clause resulted in the type of harm to the employer which gives rise to equitable relief. The Court described its holding as "narrow." *Id.,* at 253.

The question of whether a sympathy strike was enjoinable pending arbitration of the issue of whether the strike itself violated a no-strike clause was addressed by the Court in *Buffalo Forge* v. *Steelworkers, supra.* Finding that the rationale of the *Boys Markets* exception had no application in the sympathy strike context, the Court held that where the only issue was whether a sympathy strike violated a no-strike clause, a sympathy strike alleged to be in violation of a no-strike clause in a collective bargaining agreement was not enjoinable. Our decision in *Ziegler Coal Co.* v. *Local Union No. 1870,* 566 F. 2d 582, 584 (7th Cir. 1977), aptly describes the effect of *Buffalo Forge:*

> "We think it clear . . . that *Buffalo Forge* proscribes issuance of a *Boys Markets* injunction against a sympathy strike alleged to be in violation of an express or implied no-strike agreement pending arbitration of the parties' dispute over the legality of the strike. *Buffalo Forge* teaches that where a strike is not "over" any underlying dispute between the parties subject to arbitration but rather is itself the very subject of the parties' dispute, issuance of an injunction against the strike would constitute an unwarranted judicial intrusion into the merits of the controversy."

We find this case to be directly controlled by *Buffalo Forge.* As in *Buffalo Forge,* the only question in this case is whether Local 2042's sympathy strike violated § 10.2 of the collective bargaining agreement, which purports to limit the circumstances in which Local 2042 could engage in a sympathy strike. That issue, in turn, rests on a consideration of whether work was moved from either of D & M's lawfully struck Connersville plants to its Richmond plant which made necessary the hiring of new employees. Distinguishing *Buffalo Forge,* the district court found that the question of whether or not work had been moved from Connersville to Richmond was an arbitrable dispute, and concluded that Local 2042's sympathy strike should be enjoined pending arbitration of that dispute. We cannot distinguish *Buffalo Forge* and consequently disagree with the district court's conclusion.

In support of the district court's finding and conclusion, D & M argues that § 10.2 of the collective bargaining agreement was expressly designed to apply to the sympathy strike in this case, that the underlying dispute which the sympathy strike is "over" is a matter subject to arbitration under the agreement, and that the district court properly refused to modify its previous injunction. This argument is viable only if *Buffalo Forge* is distinguishable.

As previously stated, the only question raised by Local 2042's sympathy strike is whether that strike was in violation of § 10.2

of the collective bargaining agreement, and that question involved the further inquiry of whether the exception contained in § 10.2 for the movement of struck work from Connersville to Richmond applied. Whether work was moved from Connersville to Richmond is a consideration which has no significance independent of § 10.2, for nothing in the collective bargaining agreement prevents the movement of such work between plant locations. The movement of work from lawfully struck Connersville to Richmond is a relevant consideration only in the context of whether § 10.2 is applicable. Hence, the legality of the sympathy strike itself under § 10.2 was the very subject of the parties' dispute, and *Buffalo Forge* teaches that in such circumstances the district court may not enjoin a sympathy strike pending arbitration.

Accordingly, the order appealed from is reversed.

REVERSED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

Design & Manufacturing Corporation,
Plaintiff,
vs.
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,
and
ITS Richmond Unit of Local 2042
and
Wendell Pope, et al.,
Defendants.

No. IP 78-579-C

Before the Honorable S. Hugh Dillin
Transcript of Proceedings on Defendants' Petition for Clarification

October 6 and 7, 1978

United States Courthouse
Terre Haute, Indiana
Indianapolis, Indiana

Mary A. Whyte
Official Court Reporter

[62] 37 Q. The people that you set up at these gates, as you have just described—were any of them members of Local 2042?

A. No, sir. No, sir.

38 Q. Who was in that group of people?

A. Just the members of my unit out of Local 151, the people I brought from Connersville.

39 Q. Did you set up that picket line to help out Local 2042 with some problem they told you they were having?

A. No. I don't know any problems they'd have.

40 Q. Why did you set up that picket line?

A. For the interest of my unit out of 151, because I had information they had moved production to Richmond.

Mr. Macey: That's all I have.

Cross-Examination by Mr. Mattingly.

41 Q. Sir, what is the source of your information?

A. I contacted an officer out of 2042, Melvin Adams, and he give me the information that I had received.

42 Q. As I understand it, that is the sole reason why you made a decision to strike?

A. Not to strike, sir.

43 Q. To picket at the Richmond plant?

[63] A. To picket, yes, at Richmond.

44 Q. If in fact it was shown this morning that your information you received from Mr. Adams was incorrect, would you be willing to agree to ending that picketing at the Richmond plant?

Mr. Macey: I would object to the question, hypothetical.

Mr. Mattingly: I am trying to come to a practical—

The Court: I think it goes to the good faith here. I will overrule the objection.

Mr. Macey: Your Honor, what I would ask is for clarification of the question in terms of if one fact proved to be true, or what exactly about the information is counsel asking—if what turned out to be false, all of it, some of it, what extent of it?

The Court: Well, O. K. I will sustain that objection.

45 Q. Would there be conditions under which, if information was demonstrated to you that your information was inaccurate, that you would end the picketing at the Richmond plant?

A. I'd give it consideration.

46 Q. Well, if in fact—if you were shown that the [64] information was incorrect that you received from Melvin Adams, would there be any reason for you to continue that picketing?

Mr. Macey: Same objection, Your Honor.

The Court: Well, I will sustain the objection because "information" really is sort of a vague word. I will admit that is the word he used. But the contract is very specific. It talks about moving work, talks about hiring employees, so why don't you put it in terms of—

47 Q. If in fact it is shown this morning that work has not been moved and that employees have not been hired, would you end the picketing?

A. Yes, because that's the reason I put them there in the first place. I was told they were.

48 Q. So, for example—So if we can demonstrate this morning that in fact no new employees have been hired to do any work of the Connersville plant, you would be satisfied and would be agreeable to ending the picketing at the Richmond plant?

Mr. Macey: Your Honor, I would object, because, number one, it assumes a process whereby the company is going to have an opportunity to prove something. But, secondly, the way Mr. Mattingly phrased that question, it is somewhat [65] misleading —the employees were hired to do the Connersville work.

Mr. Mattingly: Your Honor, we are prepared this morning to demonstrate that the only employees that have been hired at that plant are to replace specific employees that have been terminated, either—for whatever reason for the termination. We can document that and show that this morning, and if this

is going to bring a practical solution to this problem, that's what I want to do.

The Court: I thought you had a pretty good answer in response to your first question. It is when you tried to gild that lily that you created a problem. I will sustain the objection.

49 Q. What is your information as to what employees have been hired?

A. Oh, I was shown a list—that Mr. Macey has there—that I was told that these were people that was hired since the time we started our legal strike in Connersville, Indiana, and these were people that was hired for the purposes of increasing production.

50 Q. And who provided you with this list?

A. Melvin Adams.

[66] 51 Q. And when did he provide you with this list?

A. Oh, Lordy, sir. I don't know. Since this strike started I have lost a lot of sleep and dates are not very clear to me.

52 Q. I assume he had to provide you that list before you made the decision to strike?

A. Yes, it was before Wednesday at 10:00 o'clock.

53 Q. I assume the decision to strike was before Wednesday?

A. I had—No. To strike?

54 Q. Not "Strike". To picket.

A. To picket, yes. I made that decision Wednesday night due to the fact I received more—or I received information Wednesday night from Melvin Adams.

55 Q. Did he come over and meet with you?

A. No, sir.

56 Q. How did you get this information?

A. By telephone.

57 Q. I assume he could not provide a list to you by telephone?

A. No. Let's see. I got—I was trying to think. There was a presidents' meeting that was held. Due to that presidents' meeting, I was in Richmond, and I got it at that time at the Union Hall. But [67] I was trying to think of the date of that presidents' meeting and I can't think of the date.

58 Q. Did you or anyone from your local attempt to verify with anyone at the D & M Manufacturing facility at Richmond the truthfulness of that information?

A. No, sir.

59 Q. Did you at any time attempt to contact any of the people on that list to determine the nature of the employment that they had been hired to do?

A. No, sir.

* * * * *

[88] The Court: Well, usually I listen to the arguments before I find the facts, but today I am going to find the facts before I listen to the argument, unless somebody has an objection to that.

[89] Hearing no objection, I will proceed.

I find the facts to be as follows: The plaintiff Design & Manufacturing Corporation manufactures—What do you call them, automatic dishwashers, electric dishwashers—which?

Unidentified Man: Automatic.

The Court: —automatic dishwashers at its plant in Richmond, Indiana, and also at its plant at Connersville, Indiana. That's number one.

2. The workers, the production workers at each plant are organized and belong to the International Union, the United Automobile, Aerospace and Agricultural Implement Workers of America, usually known as the UAW, the plant at Richmond being under the charge of the Richmond unit of Local 2042, and the work at Connersville being under the charge of the Connersville unit of Local 151.

Number 3. There are separate agreements covering Locals 2042 and 151. However, each contract carries a reciprocal provision having to do with strikes and lockouts, which is numbered as Section 10.2 of the Local 2042 contract, which is a matter of

record in the file in this case as [90] being attached to the petition to modify filed by the local on October 2, 1978.

Next number. The contract of Local Union 151 expired on September 16, 1978, and since that time the members of such local have been on strike. Such strike is bona fide, legal, and is a primary strike.

Next number. On October 4, 1978 the Unit Chairman of Local 151—and I might say here that when I refer to Local 151, I really mean the D & M unit of Local 151. I am just saying "Local 151" to save words. —acting on information received from an employee of the Richmond plant, and in the belief that work had been transferred from the Connersville plant to the Richmond plant, and that the Richmond plant had hired additional workers to handle said work, made a determination that Local Union 151 should establish a picket line at the Richmond plant. This decision was transmitted to a representative of the International Union before the picket line was set up, and the International Representative agreed that the establishment of such a picket line was proper, assuming the facts stated to be true.

[91] Next number. On October 5, 1978, pickets from D & M Unit Local 151 did in fact establish a peaceful picket line at the various gates to the Richmond plant and requested Richmond employees belonging to the Richmond Unit of Local 2042 not to go to work. Reasons were given as previously mentioned, that is, that Connersville work had been transferred to Richmond and additional employees hired to get out the work.

Next number. Virtually all of the members of the Richmond Unit of Local 2042 honored said picket line on October 5, 1978, and continue to honor the same. In this connection, the official position of Local 2042 is that Local 2042 recognizes the picket line of the D & M unit of Local 151 and is in sympathy with it.

Next number. Although advised of the intention of the D & M unit of Local 151 to establish the picket line at the D & M plant

at Richmond, the International Union has done nothing to encourage the Richmond unit of Local 2042 to return to work.

Next number. On October 6, 1978, the plaintiff Design & Manufacturing Company filed its petition with the Court reciting that certain [92] named individuals were refusing to report for work and were— Do you have a copy of that with you?

(Mr. Mattingly handed a paper to the Court.)

Mr. Mattingly: It is also the Local Union, too, Your Honor.

The Court —were engaged in a work stoppage at plaintiff's Richmond, Indiana plant in violation of the Court's preliminary injunction issued on September 8, 1978. Said motion and petition requested that said individuals, as well as the defendants Richmond Unit of Local 2042, be found to be in civil contempt of this Court and that appropriate sanctions issue for said contemptuous action. A citation was thereupon issued by the Court, and said individuals are each present in Court this date, as are responsible officers of said Union.

Next number. By way of response to said citation, the named individuals, namely, Wendell Pope, Robert Curtis, Russell Klingman, Charles C. Jones, Diana J. Pickering, Melvin Adams, and Charles Dale and said Local Union respond and show to the Court that they have ceased working solely in response to the picket line of D & M [93] unit Local 151, that they are in sympathy with said picket line, and that they have a right to honor said picket line pursuant to Section 10.2 of the contract between Design & Manufacturing Corporation and Richmond Unit of Local 2042 and the case of Buffalo Forge Co. v. United Steelworkers of America, 428 US 397, decided by the Supreme Court of the United States July 6th, 1976. The Court finds as a fact that the named individuals are honoring said picket line in good faith for the reasons just stated.

All right. I believe that brings us down to the legal argument about whether they are right or wrong. However, if anybody wants to suggest any additions or corrections, I will be glad to listen to that.

(Brief pause.)

The Court: Summarizing, I have found that the present work stoppage is in good faith pursuant to the 151 picket line and that there is a question of law as to whether, under the peculiar language of the 2042 contract, they have a right to do that just upon the setting up of said picket line without more, or whether they do not, and if not, what would be the appropriate—[94] does the Court have jurisdiction to issue—I would say, issue a further injunction or at least to make it plain that the present injunction continues to apply.

Does anyone have any additional facts to suggest or any corrections to what the Court—

Mr. Macey: Procedurally, Your Honor, the only thing I think that is not mentioned in your statement was the fact that we filed a motion to clarify. I don't know. You know, it's just part of the procedural scenario.

The Court: Well, all right. I think, since the last finding I made was something to the effect that they were honoring the picket line in good faith, that would seem an appropriate place to put it in. So we will add one more finding to follow the others:

On October 2, 1978, the defendants filed with the Court a motion to clarify the preliminary injunction heretofore issued by adding thereto language to the effect that the same did not apply to any work stoppage pursuant to Section 10.2 of the contract because such a work stoppage, if any, would be governed by such contract provisions.

[95] All right. Well, I suspect—What?

Mr. Mattingly: You wanted to know if there were any other facts.

The Court: Yes.

Mr. Mattingly: I was wondering if you wanted to include that the company agrees that, upon the return of the employees to work that they will agree to an expedited arbitration proceeding without briefs in the matter so that the contract dispute can be decided without delay.

The Court: Yes. I think that should be made a matter of record. And there is one other rather important matter which I have not covered, too, which I now think of. Two more findings which I believe would be germane are as follows:

The Court takes notice of the testimony heretofore given in this action and finds from such testimony that the daily loss to the company for each day this plant at Richmond is shut down because of the work stoppage is quite substantial and may well be in the area of $100,000 per day.

Next finding. The Court knows of no monetary loss that would be suffered by any member of Local 2042 if they continued to work at the D & M plant. To the contrary, they would be paid [96] their usual wages. The Court further finds that D & M Manufacturing has offered in open Court and represents that it would immediately submit any question arising under Section 10.2 of the contract to binding arbitration in an expedited manner without briefs.

I think that's about what you said, isn't it?

Mr. Mattingly: Yes. While the employees have returned to work.

The Court: What?

Mr. Mattingly: During the time that the employees have returned to work.

The Court: I understand.

O. K. Well, I think we will take a ten-minute recess, and then you can think about what you want to argue.

* * * * *

[103] The Court: I want to make another finding of fact which I omitted a while ago:

The determination of the Unit Chairman of D & M Unit Local 151 to picket the Richmond plant was based on the information received by him from one member of Local 2042 and was, thus, hearsay. The Unit Chairman made no effort to verify such information by any means.

I don't know whether that really has anything to do with it, but it is a fact.

Well, if you are through with your submission, I will tell you what I think about it. We have here a question of law, which is certainly not a very easy question, I should say. It's difficult to know where to start when one tries to recap the history of labor relations in this country, and I do not purport to be an expert in that field, in any event.

I think we all can recognize, however, that the origins of the labor movement were fraught with strife and that efforts of labor to organize were resisted vigorously and indeed violently in some instances by management. And, of course, violence in return was practiced by labor. Industrial strife was certainly not [104] unusual. There was a time when the Courts were very quick to enjoin strikes by labor organizations, which led to charges by labor, rightly or wrongly—I don't purport to know the answer —that the Courts, many Courts indeed were dominated or controlled or, more accurately, I suppose, had a bias in favor of management. And that attitude led to the eventual enactment of the Norris-LaGuardia Act, which provided that Federal Courts could not issue injunctions in labor disputes except in certain enumerated and narrowly-defined circumstances. So Federal Courts, which had apparently been issuing injunctions willy-nilly—and, as I say, all this was quite a number of years ago, and I don't know anything about any of it personally—but, as I understand at least, the practice of running to the Federal Court for injunction came to a screaming halt with the passage of the Norris-LaGuardia Act.

Time moved along and the unions got stronger. As a matter of fact, some people argued, and still argue today, that the balance is now the other way around and that the unions perhaps have too much power, which they are [105] exercising short-sightedly and so as to, for example, contribute to a great degree to inflation, which bothers all of us—including union members. And I

have no views on that, either. I am neither a labor law specialist nor economist.

But, in any event, unions through the years, and particularly since the middle 1930's and the sitdown strikes by the UAW in Detroit, have taken an increasingly important role, and someplace along the line arbitration became more and more established as a method of settling labor disputes. In some of the lead labor cases of recent years the policy of arbitration has become recognized as federal policy and as the preferred way of settling labor disputes under federal law.

That doesn't mean, of course, that anybody has to agree to arbitration or that that arbitration be binding, and it also doesn't mean that the parties have to agree to no-strike clauses. But, as I believe we all know, that is becoming and has become a relatively common fixture in labor-management agreements.

So in the *Boys Markets* case, which was decided in 1970, case entitled *Boys Markets* v. *Retail* [106] *Clerks Union,* the United States Supreme Court held that where there was an agreement to submit a dispute to binding arbitration—that is, arbitration the results of which it was agreed in advance would be final—and when a dispute arose between labor and mangement over the meaning of a contract term or something which under the contract could be and was required to be submitted to arbitration, that unions would not be permitted to strike to try to obtain agreement by management to their point of view, thereby short-circuiting the arbitration provision, but rather that in such a case the Courts not only could, but would be required to, as a matter of law, grant an injunction enjoining the strike and while the matter was submitted to arbitration.

I say Courts would be required to. Of course, they would have to make certain findings, one of which would be that the employer's loss would be irreparable—that is, it couldn't be compensated as a matter of damages—and that the loss to the employer if the injunction were not granted would be greater

than the loss to the union or the employees if the injunction [107] were to be granted.

Those findings, of course, would have to be made; but in most of these disputes that's not very hard to make, because unless the company is actually losing money, it obviously stands to suffer financial loss. Although it can theoretically sue the union for damages if an unlawful strike takes place and receive a judgment for damages, that simply serves to rub a little salt in the wounds and make labor and management relations even worse—particularly if it is attempted to collect the judgment. And, on the other hand, people ordinarily don't lose any money by working for their ordinary wages. So it's not difficult to find those requirements that I have mentioned.

So *Boys Markets* then constituted a big exception and the only major exception to the terms of the Norris-LaGuardia no-strike law. And we all thought—by "we", I mean judges and so on, labor lawyers—thought that we had a fair idea of what the labor law was after the *Boys Markets* case.

Now, four years after the *Boys Markets* case just four years ago, in 1974, came along [108] another case called *Gateway Coal Company* v. *United Mine Workers of America,* another Supreme Court case, which arguably went a little bit farther than *Boys Markets,* in the sense that in the *Boys Markets* case there was an express provision not to strike, which the Court held to be enforceable. In the *United Mine Workers* case, the United Mine Worker's contract did not contain an express provision not to strike, but it did contain a binding arbitration clause, and in that case the Court enjoined the strike—that is, the Supreme Court did. The District Court had enjoined it, and the intermediate Court, Appellate Court, had reversed the District Court. And the Supreme Court in turn reversed the Appellate Court and agreed with the District Court that the strike should be enjoined, and implied a promise not to strike when there was a no-strike clause.

Now, that was four years ago and decided 8 to 1, and the one who dissented, Justice Douglas, is no longer a member of the Court. Therefore, some people at least were surprised when just two years ago, in 1976, the *Buffalo Forge* case came along —*Buffalo Forge* v. *Steelworkers.* And in that case, where there was an [109] arbitration agreement and express no-strike clause, the Supreme Court, in a very narrowly-divided opinion —that is, five out of the nine members took one side and four out of the nine took the other side—the Court decided then in this 5 to 4 decision that the no-strike clause did not apply in the case of a sympathy strike, and it held there that *Boys Markets* plainly does not control this case.

When I say "they held", I am of course talking about the nine Justices, the majority. The District Court found, and it is not disputed, that the strike was not over any dispute between the union and the employer that was subject to the arbitration provisions of the contract, it was a sympathy strike, and so on, and had neither the purpose or effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain.

And, of course, it's that case that you are relying on, you and members of the local in this matter, which cause the petition to modify the previous injunction.

So the question therefore is, is there an arbitrable issue here? Do you have a right [110] to go out on a sympathy strike because of the *Buffalo Forge* case? I think it's a very close question. It's an interesting question from a legal standpoint.

This particular factual situation is novel to me. I don't know of any other case that has facts like this. And I don't suppose either of you attorneys know of any, either, do you?

(The attorneys indicated negative answer.)

The Court: So, for all I know, this case could end up, also, with making some law with the Supreme Court of the United States. I don't know which way, but it could well go up there.

The way I view this case—Let me say first that the *Buffalo*

Forge decision of the Supreme Court was handed down, made public, published, on July 6th, 1976. Of course, for the benefit of those of you who do not know exactly how the legal system works on the federal level: I am sure you know you start out with a trial court like this one, and whatever we do is subject to appeal and review by the Court of Appeals [111] which has supervision over that particular district. The United States is divided into 12 Appellate Circuits, as they are called. We are in the Seventh Circuit, which includes Indiana, Illinois, and Wisconsin, so anything a District Judge such as myself rules in any of these three states can be appealed to the Seventh Circuit Court of Appeals in Chicago. O.K. That Court then puts out a decision in due time, and the losing party there may ask the Supreme Court of the United States to review and set aside that decision. I say "ask", because you can't just automatically appeal to the Supreme Court and have your case considered up there because there are only nine men on the Supreme Court and they, frankly, don't have time to consider everything in the world. So you get into that Court by petition. And when a case is decided, then a petition may be made for certiorari, as we call it, which simply means a petition for the Supreme Court to order the case certified—that's where "certiorari" comes from—up there so they can consider the case in full, and then they come out with an order granting or denying leave to consider.

[112] What I am leading up to is that long before the Supreme Court decides a case, it must first grant the petition for certiorari; so that lawyers know many months and usually a year or two in advance of the decision of a case that the case is up there, the Supreme Court is going to consider it, and that in due time a ruling will come down. Attorneys who are interested in the matter also know what the decision of the lower Court, the Court of Appeals, was, because it is printed in a book. And they know what the decision of the District Court was, because it's either printed in a book or referred to by the

Court of Appeals. And the purpose of all of this is to say to you that for at least a year or two, and perhaps longer than that, before July 6th, 1976, labor lawyers, if they knew their business, knew that there was a case called *Buffalo Forge* v. *the United Steelworkers* and knew that that case dealt with the question of whether or not sympathy strikes were covered by *Boys Markets,* and knew that that question would eventually be decided one way or the other by the Supreme Court of the United States. Therefore, it is reasonable to me to infer and I do infer that when this [113] agreement was written and when the agreement with the Connersville local was written—and this clause, Section 10.2, was agreed upon—that the attorneys for the Design & Manufacturing Corporation and the attorneys for the Union had the *Buffalo Forge* case in mind. I am sure that they did, because of course the *Buffalo Forge* case antedates this other.

Now, you members of the local may say, "Well, we didn't know anything about *Buffalo Forge*", and you may well not because that wouldn't necessarily be your business, but I can assure you that the attorney for the International Union, UAW, knew about it, and I would assume that the attorneys for the company knew about it, and I would assume that that knowledge was also in the possession of the attorneys for the Local Union or whoever negotiated this contract. At least, it should have been.

It seems to me that 10.2 was written having in mind what the rules should be in Richmond and what the rules should be at Connersville in the event of a sympathy strike. Now, I hasten to say that whether they had *Buffalo Forge* in mind or not really doesn't make any difference. [114] I say I think they did and I think they were aware of it, but that's really kind of beside the point.

What is not beside the point and what is important to me in deciding this matter is that it obviously occurred to the negotiators, the company and the union—and which side

brought it up, I don't know, because I don't know which side is supposed to benefit. I thought maybe it was supposed to benefit the company, but Mr. Macey this morning said no, it is supposed to benefit the Union; and I don't know. And, once again, it doesn't make any difference. It is part and parcel of an overall contract, which is supposed to govern all of the relations between labor and management and enable you to turn out dishwashers, which are needed by the American home, and hopefully to make it possible for the company to pay reasonable wages to its employees and make a reasonable profit for its stockholders. And, assuming that the stock is listed on the stock market, and I don't know whether it is or not—Is it?

Unidentified Man: No.

The Court: Well, O. K. That's beside [115] the point, too.

Anyway, the people who negotiated this contract anticipated that a sympathy strike might occur—and that wouldn't be hard to do because, as I am learning as we go along here, we have a plant in Richmond that makes washers; there is one local there, and its contract expires at a certain time. Right there in the same compound, surrounded by the same fence, we have another plant that makes something—components, I suppose—and it is represented by the Furniture Workers, and they have a different contract. I suppose it expires at a different time. And over at Connersville we have five different plants, the workers of which all belong to Union No. 151. Some of these companies are apparently owned by D & M and some are not. And they have contracts that expire at different times. You have two D & M companies; one makes washing machines and the other just makes racks for washing machines, and why those are two different units I don't know, but they are. And, believe it or not, they have contracts that expire at different times, which is all pretty complex to me. So, under those circumstances, it is certainly [116] foreseeable that there might well be sympathy strikes.

And, with all that in mind, then, the parties agreed on Section 10 of this agreement. And the major heading for the Section 10, in capital letters, is "Strikes and Lockouts". Section 10.1 is what I will call a standard no-strike clause, because it is very similar to that which I have seen before in labor contracts. It reads as follows: "The Union agrees that it will not engage in, initiate, authorize, sanction or support any strike, slowdown, stoppage of work or other interference with production or the quality of the product during the life of this agreement."—And—"The company agrees that there shall be no lockouts during the life of this agreement."

O. K. That's the usual type clause, and it doesn't say anything about sympathy strikes. And it was that type of a clause that the Supreme Court had before it in *Buffalo Forge,* and it said: "Well, there is nothing in that contract that mentions sympathy strikes. There's just a general catch-all that says 'We will arbitrate anything that comes up', and so we are going to [117] hold that *Boys Markets* doesn't apply in this case."

However, in this case, then, we have this Section 10.2, which specifically addresses itself to the question of sympathy strikes—which reads: "In the event of a strike by the Union at either of the company's plants in Connersville, Indiana, the Union will not strike or picket in any manner the Richmond plant, nor will employees in the Richmond unit support the strike in Connersville by any picketing, strike or work stoppage of any kind. However, this limitation shall not apply in the event that the company brings any production from either of the Connersville plants to Richmond which would necessitate hiring new employees at the Richmond plant during a lawful strike at either of the Connersville plants."

So this contract then goes a step further down the road and says specifically that it will apply to sympathy strikes, which was not necessarily true in the *Buffalo Forge* case, because that was the matter that was supposed to be arbitrated in that case.

Then the question arises, well, there is an exception and it is permissible to go on [118] a sympathy strike if the company is doing certain things. So you can argue to me, and I'm sure Mr. Macey would, "Well, in this case Connersville determined that certain things were going on, and that's all that is necessary."

Well, it is that sort of a situation that was contained in the *Gateway Coal* case in which the Court said: "Absent the most explicit statutory command," —referring back to Norris-LaGuardia—"we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be. We agree with Judge Rosenn"—that was the District-level judge—"that a union seeking to justify a contractually prohibited work stoppage . . . must present 'ascertainable, objective evidence supporting its conclusion' "—blah, blah, blah. "We find this reading of the statute consistent both with common sense and with its previous application."

And so, then, they went on to hold that an injunction in that case was appropriate. Now, five of the people who said that are the same [119] five who two years later were the majority in *Buffalo Forge*. So did they change their minds completely in that period of time as to the general theory, or what? I don't think they changed their minds at all. I think they distinguished between the *Gateway* case, which clearly involved a strike over an arbitrable issue, and *Buffalo Forge,* in which there was no arbitrable issue and no language at all as to sympathy strikes, one way or the other—either permitting them or prohibiting them.

In this case, your case, we have express language under the Strikes and Lockouts section that prohibits a sympathy strike, and it's just as much a part of the no-strike clause as is the general language. You might even say it is more a part of it, because there is no question about what it says.

Then there is an exception—shall not apply if the company brings production from Connersville to Richmond. Well, now, who is to determine that exception? Well, obviously, since it is a part of the contract, we have to refer back to the arbitration clause for that, and the Grievance procedure and so on. [120] And that is on Page 7, Section 4.1: "A grievance is defined to mean any question or controversy between the Company and the Union . . . concerning:

"(2) Any disagreement arising out of the application, interpretation or enforcement of the provisions of this Agreement." —very, very broad.

So it's my interpretation of all of this that the strikes and lockouts thing, which was not specific in Buffalo Forge as to whether or not it included sympathy strikes, is specific in this case, and it does include sympathy strikes. And the only exception or way around it would be to show that the company has moved the work to such a large extent that it's h[illegible] to hire new employees to turn it out.

Now, that being an exception which the Union presumably would like to have apply, and since the company obviously disagrees that that exception is applicable and has so stated, that would seem to me to be an arbitrable grievance, and I believe that the strike or work stoppage presently going on up there is enjoinable and that the parties should b[illegible] and are directed to proceed [121] immediately to an expedited arbitration of this question.

That means, of course, that all of these individuals and the Union are in civil contempt of the previous order of this Court. They knew that there was a question about this or they wouldn't have authorized their attorney to come into Court on the 2nd day of October and file a petition to find that it was O. K. for them to engage in a sympathy strike. And, notwithstanding their knowledge in that regard—which is an obvious inference—they nevertheless started this work stoppage on the 5th and continued it yesterday, and I don't know whether the plant works on Saturday or not, but it is still going on.

So it's the judgment of the Court—Does anyone want to speak in mitigation before I tell you what the penalty is?

Mr. Macey: Not so much in terms of mitigation, but I would speak in terms of the Court's power to penalize as opposed to coerce, in the sense that I would urge that the Court not impose a penalty for past action, because I believe that there is pretty definite case law [122] that the proper use for civil contempt is to coerce so that the order will be obeyed, not to penalize for past acts. I am distinguishing between civil and criminal contempt. I would also state to the Court that three of the named individuals—and this information has been relayed to the company—three of the named individuals are no longer members of the committee, and I believe that the company named all of those people because that was their last information, at least their attorney's last information about who were members of the committee.

The Court: Well, I don't know that this case requires any instant penalties. So, having in mind the findings I have already made, that these folks were in good faith, I am not going to assess any penalties for past acts. However, I am going to find and order that if the contempt has not ceased by Monday, the 9th of October, 1978, that the Union 2042 is going to be assessed a thousand dollars a day; that the individuals are going to be assessed $100 a day.

The Court has other powers at its disposal, but I think we ought to try the financial angle before we indulge in anything any more [123] gruesome. Meanwhile, hopefully you can get this matter resolved in about a week. And, of course, if it turns out that the company is moving work over there and the arbitrator so finds, why, that's a horse of a different color. Not only would the injunction cease, but I suppose we'd try to work out some unpleasantries for management.

Well, if there is nothing further, that will be all.

(Adjournment was had at 12:03 P. M. on October 7, 1978.)

* * * * *

APPENDIX C.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

DESIGN & MANUFACTURING CORPORATION,
Plaintiff,
vs.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS (UAW)
and
its RICHMOND UNIT OF LOCAL 2042
and
WENDELL POPE, ROBERT CURTIS, RUSSELL KLINGMAN, CHARLES C. JONES, DIANA J. PICKERING, MELVIN ADAMS and CHARLES DALE, individually and as members and representatives of THE RICHMOND UNIT OF LOCAL 2042 OF INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS (UAW), and as representatives of the class of striking employees of Design & Manufacturing Corporation,
Defendants.

Cause No. IP 78-579-C

PRELIMINARY INJUNCTION

Comes now the Plaintiff in the above entitled cause of action and it appearing to the Court that the Plaintiff has heretofore filed its verified complaint praying for a temporary restraining order and preliminary injunction specifically enforcing a collective bargaining contract, having filed its bond as provided by law to the approval of the Court, having given notice of said application and having requested the Court for a preliminary injunction following a hearing with notice upon said verified complaint to specifically enforce a collective bargaining contract, and the hearing having been held with the parties, including representatives of the defendants, being present and having presented evidence, the Court, being duly advised in the premises, now makes the following specific Findings of Facts and Conclusions of Law:

(H. I.)

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT THAT THE NAMED DEFENDANTS, AND EACH OF THEM, AND THE OFFICERS, AGENTS, COMMITTEEMEN, REPRESENTATIVES, EMPLOYEES AND MEMBERS OF LOCAL 2042 OF THE UAW AND ALL THE STRIKING EMPLOYEES EMPLOYED BY PLAINTIFF AND ALL PERSONS NOW OR HEREAFTER AIDING AND ABETTING THEM, ARE HEREBY ORDERED AND DIRECTED TO CEASE PICKETING AND CAUSING OR CONTINUING THE STRIKE AND CONCERTED STOPPAGE OF WORK AT THE PLAINTIFF'S FACTORY IN RICHMOND, WAYNE COUNTY, INDIANA; AND THEY ARE HEREBY ORDERED AND DIRECTED TO UTILIZE THE GRIEVANCE AND ARBITRATION PROCEDURE CONTAINED IN SAID COLLECTIVE BARGAINING AGREEMENT FOR THE SETTLEMENT OF ALL DISPUTES.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Local 2042 of the UAW and its officers and representatives give immediate, prompt and clear written notification to the members of the Defendant labor organization employed in the Plaintiff's facility in Richmond, Wayne County, Indiana, of the provisions of this Preliminary Injunction, notifying the said members that any continuation of the picketing, strike, tie-up and concerted stoppage of work at the Plaintiff's facility in Richmond, Wayne County, Indiana, is unauthorized and to be terminated immediately, and to notify and encourage such members in good faith to refrain from any continuation of the picketing, strike, tie-up and concerted stoppage of work at the Plaintiff's facility in Richmond, Wayne County, Indiana.

The United States Marshall (sic) is directed to serve this order immediately on all Defendants and to take appropriate steps to enforce this order including the arrest of any person violating this order.

Dated: September 8, 1978 Time: 10:40 a.m.

/s/ S. HUGH DILLIN
Judge, United States District Court

Certified: A True Copy, William A. Heede, U. S. District Court, Southern District of Indiana.

By /s/
Deputy Clerk

APPENDIX D.

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a degree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Mar. 23, 1932, c. 90, § 7, 47 Stat. 71.

APPENDIX E.

§ 173. Functions of Service

* * * * *

Use of conciliation and mediation services as last resort

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

June 23, 1947, c. 120, Title II, § 203, 61 Stat. 153.

SUBCHAPTER IV—LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this

chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

* * * * *

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

APPENDIX F.

AGREEMENT

BETWEEN

DESIGN & MANUFACTURING CORPORATION

AND

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS (UAW)

AND ITS

RICHMOND UNIT of Local 2042

Agreement

THIS AGREEMENT, Entered into this 17th day of February, 1978, by and between the DESIGN AND MANUFACTURING CORPORATION of Connersville, Indiana (hereinafter referred to as the "Company") and its successors, and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS (UAW), and its D & M unit of Local 2042 as certified by the National Labor Relations Board on October 3, 1977, in Case No. 25-RC-6686, (hereinafter referred to as the "Union") and its successors, WITNESSETH:

* * * * *

SECTION 10.0

Strikes and Lockouts

Section 10.1. The Union agrees that it will not engage in, initiate, authorize, sanction or support any strike, slowdown,

stoppage of work or other interference with production or the quality of the product during the life of this Agreement. The Company agrees that there shall be no lockouts during the life of this Agreement.

Section 10.2. In the event of a strike by the Union at either of the Company's plants in Connersville, Indiana, the Union will not strike or picket in any manner the Richmond plant, nor will employees in the Richmond unit support the strike in Connersville by any picketing, strike or work stoppage of any kind. However, this limitation shall not apply in the event that the Company brings any production from either of the Connersville plants to Richmond which would necessitate hiring new employees at the Richmond plant during a lawful strike at either of the Connersville plants.

* * * * *

SECTION 4.0

Grievance Procedure

Section 4.1—Definition of a Grievance. A grievance is defined to mean any question or controversy between the Company and the Union, or between the Company and any employee or employees covered by this Agreement, concerning:

(1) Any matter relating to rates of pay, hours of work or other conditions of employment which are not covered by this Agreement, or

(2) Any disagreement arising out of the application, interpretation or enforcement of the provisions of this Agreement.

Section 4.2—Grievance Procedure. No grievance will be recognized unless it is presented in writing within ten (10) working days after the employee or employees involved have knowledge or by the exercise of reasonable diligence should have had knowledge of the facts upon which the grievance is based,

unless said time limitation is extended by mutual agreement in writing. All grievances shall be processed in accordance with the procedure set forth in this section.

Step 1. The aggrieved employee and/or his Steward shall present the grievance orally to the employee's Foreman.

If no satisfactory adjustment is effected, the Steward involved may forward the grievance in writing, bearing the initials of the Foreman and the Steward involved, to the next step.

Step 2. The Committeeperson shall present the written grievance to the Industrial Relations Director not later than two (2) working days following the date of the Foreman's answer in Step 1 and shall attempt to adjust the matter with the Industrial Relations Director. If no satisfactory adjustment is effected within two (2) working days, the Industrial Relations Director shall write his decision on the grievance form within said two (2) days.

Step 3. The Bargaining Committee shall meet with representatives of management in an attempt to dispose of the grievance. A representative of the International Union may be present at meetings in this step. Meetings to consider grievances under this step of the Grievance Procedure shall be held at reasonable times by pre-arranged appointment and unless otherwise agreed, shall be held within five (5) working days after the date of the decision of the Industrial Relations Director in Step 2. The Company will give its written decision to the Union in this step of the Grievance Procedure within three (3) working days after the meeting.

Step 4. In the event that a grievance involving the application, interpretation or enforcement of the provi-

sions of this Agreement shall not have been satisfactorily adjusted during the three steps of the Grievance Procedure outlined above, the Union may submit the grievance to arbitration by giving notice, within twenty (20) calendar days following receipt of the Company's answer in Step 3, of its desire to arbitrate. If such notice is given, the parties shall select an arbitrator from the panel of nine (9) identified in Exhibit 2 attached hereto by alternately striking from said panel.

The parties agree to pursue arbitration as quickly as possible.

The Arbitrator may interpret the Agreement and apply it to the particular issue presented to him but he shall have no authority to add to, subtract from or in any way modify the terms of this Agreement or any Agreement made supplementary hereto. The Arbitrator shall, in any case upon which he has the power to rule under the provisions of this Agreement, hold hearings upon the issue, make such investigations as he shall deem necessary and proper to a decision and shall render his decision in writing within a reasonable time. Said decision shall be final and binding upon all parties to this Agreement. The Company agrees to pay seventy-five percent (75%) of the expenses and fees of the arbitrator.

Section 4.3—Suspension and Discharge. It is agreed that grievances involving the suspension or discharge of an employee shall be initiated at Step 2 of the Grievance Procedure and that the Company will give notice in writing to the President immediately after any suspension or discharge of an employee. If such notice is given and no written appeal is filed either by the employee or the Union within five (5) working days after receipt of such notice, the suspension or discharge will not be subject to further appeal.

In the event the suspension or discharge is appealed by either the suspended or discharged employee or the Union within the time limits set forth above, a meeting will be held within two (2) working days between the Bargaining Committee and the Company for the purpose of conducting a hearing on the suspension or discharge. If the Union or the Company so desires, the suspended or discharged employee may attend such hearing for the purpose of giving his version of the circumstances surrounding the suspension or discharge. In the event this hearing fails to produce a settlement of the suspension or discharge, the Union may, within twenty (20) calendar days following such hearing, notify the Company in writing of its intention to refer the matter to arbitration in accordance with the procedure set forth in Section 4.2.

The Arbitrator shall be authorized to sustain, modify or set aside the suspension or discharge.

Section 4.4—Time Limits. Any grievance not filed or appealed by the Union to the next step of the grievance procedure within the time limits provided in Section 4.2 shall be deemed to be conclusively settled upon the basis of the last decision of the Company, unless mutually agreed by the Company and the Union. In the event that the Company fails to answer a grievance at any step within the time limits provided in Section 4.2, the grievance shall be deemed advanced to the next step of the Grievance Procedure. A settlement under this section will be considered a settlement without prejudice or precedent to the parties.

Section 4.5—Presentation of Grievance. It is agreed that no grievance shall be recognized unless it is presented in accordance with the Grievance Procedure outlined in Sections 4.2 and 4.3.

Section 4.6—Settlement of Grievances. The settlement of all grievances shall be reduced to writing in words agreeable to all parties and shall be written on and attached to each copy of the

written grievance and shall be signed by representatives of the parties involved.

Section 4.7—General Grievance. When a grievance involves a number of employees resulting from a decision by management, then the Union may put a policy grievance in covering said employees.

The grievance may be filed by the President of the Local or his designated representative. Such grievance shall be placed in Step 1 but shall be with the Industrial Relations Director. If not settled in Step 1 the grievance shall be eligible for advancement to the next step of the Grievance Procedure unless the Company and Union agree to bypass one of the steps.

Section 4.8—Grievance of an Emergency Nature. When a grievance of an emergency nature arises, the President or his designated alternate may contact the Industrial Relations Director or his designated alternate and arrange for a reasonably prompt meeting between the Industrial Relations Director and the Union bargaining committee.

Section 4.9—Discipline—Right to Representation. For purposes of this section, discipline shall be deemed to mean discharge, suspension, a written reprimand, or a reprimand of which a written record is made, administered by the Industrial Relations Department. Discipline shall not be deemed to include written or oral communications from a foreman to an employee.

At the time discipline is imposed on an employee, the employee's designated Bargaining Committeeperson shall be present. Where this section provides for the presence of a Bargaining Committeeperson, he shall be notified by the Company.

Section 4.10—Removal from an Operation. Before an employee is removed from an operation because of his failure to meet the production schedule, the required quality of work, or the proper use of equipment, the employee shall be entitled to representation by a Bargaining Committeeperson.

In the event of an increase in schedule or the addition of tasks to an operation, an employee affected thereby shall not be removed from the operation because of failure to meet the production schedule unless he has been given five (5) working days to meet the production schedule. An employee removed will be assigned vacant work in his job classification. If there is no vacant work in the employee's job classification, the employee then will be assigned to replace the most junior employee in said job classification, providing that he has seniority over said employee. If he does not have seniority over said employee, he will be assigned to any vacant work in his department. If there is no vacant work in his department, he will be assigned to any vacant work in the bargaining unit. This paragraph has no application to employees who intentionally or wilfully fail to meet the production schedule.

Section 4.11—International Time Study Representative(s). In the event of dispute on production standards, the Union shall have the right to call in International Union time study representative(s) to investigate such dispute.

* * * * *

APPENDIX G.

AGREEMENT

BETWEEN

DESIGN & MANUFACTURING CORPORATION

AND

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS (UAW)

AND ITS

D & M UNIT of Local 151

Agreement

THIS AGREEMENT, entered into this 12th day of October, 1978, by and between the DESIGN AND MANUFACTURING CORPORATION of Connersville, Indiana (hereinafter referred to as the "Company"), and its successors, and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS (UAW), and its D & M Unit of Local No. 151 as certified by the National Labor Relations Board on August 29, 1959, in Case No. 35-RC-1647 (hereinafter referred to as the "Union"), and its successors, WITNESSETH:

* * * * *

SECTION 10.0

Strikes and Lockouts

The Union agrees that it will not engage in, initiate, authorize, sanction or support any strike, slowdown, stoppage of work

or other interference with production during the life of this agreement, except as provided below. The Company agrees that there shall be no lockouts during the life of this agreement.

In the event of a strike by the Union at the Company's dishwasher plant in Richmond, Indiana, the Union will not strike or picket in any manner the Connersville plant, nor will employees in the Connersville unit support the strike in Richmond by any picketing, strike or work stoppage of any kind. However, this limitation shall not apply in the event that the Company brings any production from the Richmond dishwasher plant to Connersville which would necessitate hiring new employees at the Connersville plant during a lawful strike at the Richmond dishwasher plant.

* * * * *

APPENDIX H.

AGREEMENT

BETWEEN

DESIGN & MANUFACTURING CORPORATION

AND

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS (UAW)

AND ITS

D & M UNIT of Local 151

Agreement

THIS AGREEMENT, entered into this 30th day of August, 1976, by and between the DESIGN AND MANUFACTURING CORPORATION of Connersville, Indiana (hereinafter referred to as the "Company"), and its successors, and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS (UAW), and its D & M Unit of Local No. 151 as certified by the National Labor Relations Board on August 29, 1959, in Case No. 35-RC-1647, (hereinafter referred to as the "Union") and its successors, WITNESSETH:

* * * * *

SECTION 10.0

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The Union agrees that it will not engage in, initiate, authorize, sanction or support any strike, slowdown, stoppage of work or other interference with production during the life of this agreement, except as provided below. The Company agrees that there shall be no lockouts during the life of this agreement.

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Supreme Court, U. S.
FILED
APR 11 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1421

DESIGN & MANUFACTURING CORPORATION,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 2042, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION FOR UAW & its LOCAL 2042, *et al.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1421

DESIGN & MANUFACTURING CORPORATION,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 2042, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION FOR UAW & its LOCAL 2042, *et al.*

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local 2042, *et al.*, by counsel, respectfully pray that the Court *deny* the Petition for Writ of Certiorari.

OPINION BELOW

The opinion below is reported at: *Design & Manufacturing Corp.* v. *UAW et al.*, 608 F.2d 767 (7th Cir. 1979).

COUNTERSTATEMENT OF QUESTION PRESENTED

A labor agreement provides that a sympathy strike is allowed under certain circumstances. The employer and union disagree about what the facts are, in a given case, and the union holds a sympathy strike. There is no other dispute between the parties, arbitrable or otherwise, at *that* location. Does *Buffalo Forge Co.* v. *U.S.W.*, 428 U.S. 397 (1976), control?

STATEMENT OF THE CASE

For the instant purposes, Respondents will accept Petitioner's Statement of the Case.

ARGUMENT

Petitioner argues that the decision below cannot be reconciled with *Buffalo Forge* and its predecessors, *Gateway Coal* and *Boys Markets*.[1]

The labor agreement's no-strike clause here permitted sympathy strikes when there is both a movement of work and the hiring of new employees. D & M claims that the sympathy strike here was "over a dispute that is arbitrable under the agreement notwithstanding the fact that it was also a sympathy strike." (Pet. Br. 13)[2]

But the Court of Appeals held that the cause of the sympathy strike was *not* the movement of work and hiring of new employees, but the *legal* strike for a new agreement at the sister local. (Pet. A. 6, 13-14) The movement of work and hiring did not "cause," it only

[1] *Buffalo Forge Co.* v. *U.S.W.*, 428 U.S. 397 (1976); *Gateway Coal Co.* v. *U.M.W.*, 414 U.S. 368 (1974); *Boys Markets* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970).

[2] Pet. Br. refers to the Petition For A Writ Of Certiorari; Pet. A. refers to the Appendix attached to the Petition.

permitted, the sympathy strike. (Pet. A. 6) The employer had an unquestioned right to move the work and hire additional employees. (Pet. A. 6) The *only* dispute between the employer and the union at *this* location is the construction of the no-strike clause itself. (Pet. A. 6)

In *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970), this Court found a narrow exception to the Norris-LaGuardia Act[3] where a no-strike clause existed and the strike was over an arbitrable issue.

In *Gateway Coal Co.* v. *U.M.W.*, 414 U.S. 368 (1974), the exception was allowed where a safety dispute was subject to arbitration. The claim that public policy did not favor the arbitration of safety disputes was specifically rejected. The Court also held that § 502 of the Labor-Management Relations Act, 29 U.S.C. § 143, did not justify a refusal to work because of the workers' subjective good faith belief of physical danger.[4]

However, in *Buffalo Forge Co.* v. *U.S.W.*, 428 U.S. 397 (1976), the Court refused to apply *Boys Markets*' "narrow exception" to sympathy strikes. There, the cause of the sympathy strike was a legal, primary, economic strike between the same company and a sister local, at another location. Since this underlying dispute could not be arbitrated, the Court held a "*Boys Markets*" injunction could *not* issue. The sympathy strike was *not* an attempt by the Union to use economic power to win an issue which the union had previously agreed to arbitrate:

> . . . the strike was not over any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of

[3] 29 U.S.C. § 104.

[4] Petitioner misreads *Gateway* as rejecting a subjective good faith belief that the union had a contractual right to strike.

> sister unions negotiating with the employer; neither its causes nor the issue underlying it was subject to the settlement procedures provided by the contracts between the employer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain. [428 U.S. at 408]

The case at bar is almost identical to *Buffalo Forge*. In both cases, the employer contended that the sympathy strike was prohibited by the no-strike clause. In both cases, the parties agreed that whether the sympathy strike violated that clause *was* subject to arbitration.

The only difference here is that the no-strike clause mentions the factual circumstances under which sympathy strikes are permitted.[5] This, it is argued, makes the question of whether the sympathy strike violates the no-strike clause more clearly arbitrable. But in *Buffalo Forge* the Court expressly *rejected* the arbitrability of the employer's claim that the sympathy strike violated the contract *as being grounds* for enjoining the sympathy strike. At the very opening of the opinion:

> The issue for decision is whether a federal court may enjoin a sympathy strike pending the arbitrator's decision as to whether the strike is forbidden by the express no-strike clause contained in the collective bargaining contract to which the striking union is a party. [428 U.S. at 399]

The Court's answer is clear:

> Concededly, the issue [whether the sympathy strike violated the no-strike clause] was arbitrable. It was

[5] In this respect this case is a sport, since the Company could have either sought a total waiver of the right to sympathy strike, *NLRB* v. *Rockaway News Co.*, 345 U.S. 71 (1953), or agreed to submit to arbitration any differences which may arise which are *not* covered by the labor agreement as in *W-I Canteen Service Inc.* v. *NLRB*, 606 F.2d 738 (7th Cir. 1979).

> for the arbitrator to determine whether there was a breach, as well as a remedy for a breach, and the employer was entitled to an order requiring the union to arbitrate . . . . However that may be, it does not follow that the District Court was empowered not only to order arbitration but to enjoin the strike pending the decision of the arbitrator, despite the express prohibition of § 4(a) of the Norris-LaGuardia Act against injunctions prohibiting any person 'from ceasing or refusing to perform any work or to remain in any relation of employment.' If an injunction could issue against the strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of § 4. [428 U.S. at 411]

The litmus test for an injunction pending arbitration is the arbitrability, not of the employer's claim of a no-strike clause violation, but of the claim the Union was striking over, rather than arbitrating. In *Buffalo Forge* this Court insisted that it is the arbitrability of the claim held by the party with the strike option that brings a case within the narrow exception to Norris-LaGuardia:

> Striking over an arbitrable dispute would interfere with and frustrate the arbitral processes by which the parties had chosen to settle a dispute. The *quid pro quo* for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration machinery.
>
> * * *
>
> The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue underlying it was subject to the settlement procedures provided by the contracts between the employer and respondents. The strike had neither the purpose nor the effect of deny-

> ing or evading an obligation to arbitrate or of depriving the employer under his bargain. [428 U.S. 407-408]

In its struggle to find a union claim to point to as one the Union was striking over rather than arbitrating, the Company grasps at the exception to the sympathy strike ban in favor of situations where work is moved and people are hired. The Union, the Company asserts, could have claimed the movement of work and hiring violated the contract. It should have arbitrated that claim, rather than striking, the Company concludes.

But the Court of Appeals addressed that view of the matter and rejected it, holding that "nothing in the collective bargaining agreement prevents the movement of such work between plant locations. . . . Hence, the legality of the sympathy strike itself under § 10.2 [of the contract] was the very subject of the parties' dispute and *Buffalo Forge* teaches that in such circumstances the district court may not enjoin a sympathy strike pending aribitration." (Pet. A. 6)

CONCLUSION

For the foregoing reasons, the Court should *deny* the petition.

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Respondents.

BRIEF OF THE INDIANA LEGAL FOUNDATION, INC. AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

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BRIEF OF THE INDIANA LEGAL FOUNDATION, INC. AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

INTEREST OF THE AMICUS CURIAE.

This brief is filed pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States. Both counsel for petitioner and counsel for respondent have stated that the respective parties consent to the filing of this brief.

The Indiana Legal Foundation, Inc. ("Foundation") is a corporation organized under the Indiana not-for-profit corporation act by a group of concerned Indiana citizens. Its purpose is to provide responsible representation in litigation and administrative proceedings involving broad and significant constitutional and legal questions. The Foundation's membership includes in

excess of one hundred (100) corporations that do business in Indiana. Funds for the operating budget of the Foundation are provided through grants from private sources and through support from Indiana businesses, trade and professional associations and individuals. Contributions to the Foundation are deductible for federal income tax purposes.

The Foundation believes that the instant case presents a legal issue of significance to the public because it involves a generally applicable aspect of national labor policy, that is, whether or not collective bargaining agreements are subject to effective enforcement. Petitioner (Appellee in the Court of Appeals) and Respondent are expected to direct their arguments principally to the question of whether or not the instant case is distinguishable on its facts from *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U. S. 397 (1976), and is instead subject to the rule of *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970). The Foundation acknowledges that this question is in the instant case and agrees with Petitioner's position that the instant case is distinguishable from *Buffalo Forge, supra*. The Foundation also believes that the facts of the instant case logically suggest a reconsideration of *Buffalo Forge*. This brief is directed toward such reconsideration. If the Court does reconsider *Buffalo Forge*, and decides to overrule that decision, such a holding would dispose of the instant case.

THE FACTS.

The Collective Bargaining Agreement.

The relevant portions of the collective bargaining agreement must be briefly characterized:

SECTION 4.0

GRIEVANCE PROCEDURE

Section 4.1—Definition of A Grievance.

> *A grievance is defined to mean any question or controversy between the Company and the Union, or between the Company and any employee or employees covered by this Agreement, concerning:*
>
> (1) Any matter relating to rates of pay, hours of work or other conditions of employment which are not covered by this Agreement, or
>
> (2) *Any disagreement arising out of the application, interpretation or enforcement of the provisions of this Agreement.*

Section 4.2—Grievance Procedure.

> *. . . All grievances shall be processed in accordance with the procedure set forth in this section.* (emphasis added)

It appears therefore that the Employer and the Union broadly defined a grievance and included "Any disagreement arising out of the application, interpretation or enforcement of the provisions of the Agreement." And the parties agreed that "All grievances shall be processed" pursuant to the grievance procedure.

Section 4.2 proceeds with a four-step procedure, the last step of which begins as follows:

> Step 4. In the event that a grievance involving the application, interpretation or enforcement of the provi-

> sions of this Agreement shall not have been satisfactorily adjusted during the three steps of the Grievance Procedure outlined above, the Union may submit the grievance to arbitration by giving notice, within twenty (20) calendar days following receipt of the Company's answer in Step 3, of its desire to arbitrate.

Step 4 proceeds to provide for the selection of the arbitrator, a description of his authority, the payment of his fees and that his "decision shall be final and binding on all parties to this Agreement." In Section 4.4, it is provided that unless a grievance is filed and advanced by the Union within the contractually specified time limits, it is deemed conclusively settled on the basis of the Company's last decision.

In view of the foregoing, the contract on its face contemplates a mandatory grievance and arbitration procedure as the only contractual enforcement procedure. The contract on its face also contemplates the binding effect of an arbitration decision. These characteristics of the contract are true with respect to "any disagreement arising out of the application, interpretation or enforcement of the provisions of the Agreement."

The no-strike clause was the source of the contracting parties' disagreement about application, interpretation, and enforcement. That clause, the traditional counterpart of an agreement to arbitrate, confirms the mandatory, inclusive and binding arbitration contract of the parties. It also contained an unusual agreement about sympathy strikes:[1]

SECTION 10.0

STRIKES AND LOCKOUTS

> *Section 10.1.* The Union agrees that it will not engage in, initiate, authorize, sanction or support any strike, slowdown, stoppage of work or other interference with production or the quality of the product during the life of this Agreement. The Company agrees that there shall be no lockouts during the life of this Agreement.
> *Section 10.2.* In the event of a strike by the Union at either of the Company's plants in Connersville, Indiana, the Union will not strike or picket in any manner the Richmond plant, nor will employees in the Richmond unit support the strike in Connersville by any picketing, strike or work stoppage of any kind. However, this limitation shall not apply in the event that the Company brings any production from either of the Connersville plants to Richmond which would necessitate hiring new employees at the Richmond plant during a lawful strike at either of the Connersville plants.

1. It appears in the record that a correlative provision existed in the parties' Connersville collective bargaining agreement.

Thus, the parties expressly contracted about sympathy strikes at Richmond arising out of a strike at Connersville. On the one hand, they contracted generally to prohibit such strikes; on the other, they contracted to permit such strikes:

> in the event that the Company brings any production from either of the Connersville plants to Richmond which would necessitate hiring new employees at the Richmond plant during a lawful strike at either of the Connersville plants.

It is undisputed that the parties had a "disagreement arising out of the application, interpretation or enforcement" of their contract and that the disagreement was specifically concerned with the fact question of whether or not the Employer had taken these acts which permitted the Union to strike at Richmond. The record establishes that the Union contended that such acts had been taken. The Employer denied that such acts had been taken, and offered to submit that question to expedited arbitration. The Union spokesman responsible for the picketing that caused the strike testified that if such acts had not been taken the picketing would be terminated.

THE ISSUE.

Is there equity jurisdiction under Section 301(a) of the Labor Management Relations Act of 1947[2] to enjoin a strike pending arbitration of an arbitrable question as to whether an employer has taken those acts which, pursuant to the collective bargaining agreement, permit a sympathy strike?

2. Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U. S. C. § 185(a) (1970).

ARGUMENT.

Consideration of the instant case requires an analysis of the three decisions that surround the instant case: *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U. S. 235 (1970); *Gateway Coal Co.* v. *United Mine Workers,* 414 U. S. 368 (1974); and *Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U. S. 397 (1976). To the practitioner, such an analysis suggests something curious about the state of law with which these cases are concerned.

An analysis of the three cases begins with an identification of what they have in common, with a consideration of the common philosophy of the three decisions. This philosophy appears in connection with four *reasons* that the cases offer: the existence of a national labor policy in favor of arbitration of contract disputes; the status of the Norris-LaGuardia Act's[3] jurisdictional limitations; the fact that the equity remedy is the meaningful remedy in enforcement of arbitration and no-strike agreements; and the fact that the absence of equitable enforcement deprives the employer of its bargain.

National Labor Policy.

All three decisions reiterate a national labor policy in favor of arbitration as the method for resolving disputes between employers and unions. In *Boys Markets,* this discussion occurs especially at page 252 of the decision. The national policy is attributed to the Congress. A commentator's statement that refers back to *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957) is approvingly quoted: "(*Lincoln Mills*) went a long way towards making arbitration the central institution in the administration of collective bargaining contracts."[4] *Gateway*

3. 47 Stat. 70, 29 U. S. C. § 101 *et seq.*

4. 398 U. S. at 252.

Coal contains a consistent statement of the compelling nature of this national policy at pages 377-379. Section 203(d) of the Labor Management Relations Act of 1947 is quoted as a statement of the policy.[5] To the Steelworkers Trilogy is attributed "the now well-known presumption of arbitrability for labor disputes. . . ."[6] And *Buffalo Forge* is no less categorical. That decision approvingly characterizes *Boys Markets* with respect to this "strong congressional preference for the private dispute settlement mechanisms agreed upon by parties."[7] The decision reflects this policy in extensive dicta concerning the *Buffalo Forge* sympathy strike:

> [E]ach of the contracts between the parties also has an arbitration clause broad enough to reach not only disputes between the Union and the employer about other provisions in the contracts but also as to the meaning and application of the no-strike clause itself. Whether the sympathy strike the Union called violated the no-strike clause, and the appropriate remedies if it did, are subject to the agreed-upon dispute-settlement procedures of the contracts and are ultimately issues for the arbitrator. (citations omitted) The employer thus was entitled to invoke the arbitral process to determine the legality of the sympathy strike and to obtain a court order requiring the Union to arbitrate if the Union refused to do so. (citation omitted) Furthermore, were the issue arbitrated and the strike found illegal, the relevant federal statutes as construed in our cases would permit an injunction to enforce the arbitral decision. (citation omitted)

428 U. S. at 405.

Role of Norris-LaGuardia.

The decisions are also consistent in their conceptual view of the Norris-LaGuardia Act. According to *Boys Markets*, that statute must be considered in the context of the abuses it was

5. 414 U. S. at 377.
6. *Id.*
7. 428 U. S. at 407.

designed to correct and in the light of the National Labor Relations Act,[8] the Labor Management Relations Act and other subsequent legislation. Norris-LaGuardia is therefore not a statement of absolutes. It must be accommodated and reconciled with legislative and judicial experience and what has happened to labor organizations and industrial relations. This accommodation and reconciliation is a "task of the courts."[9] *Gateway Coal* approvingly and extensively cites and characterizes *Boys Markets* on this point.[10] *Buffalo Forge* is not as express on the role of Norris-LaGuardia as the other two decisions, but it is implicitly consistent. Like the prior cases, *Buffalo Forge* is itself an inquiry into the appropriate role of Norris-LaGuardia as a matter of judicial policy.

Significance of the Equitable Remedy.

On the meaningfulness of the equitable remedy, *Boys Markets* has this to say:

> [A]ny incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union.

398 U. S. at 248.

Gateway Coal also concerned itself with the significance of the injunction as the remedy. Quoting *Boys Markets*, *Gateway Coal* spoke of the devastating implications for the enforcement of

8. 61 Stat. 149, 29 U. S. C. § 151 *et seq.*
9. 398 U. S. at 251.
10. 414 U. S. at 380-85.

arbitration agreements if equitable relief is unavailable.[11] *Buffalo Forge* is again not so express, but the above-quoted dicta regarding the circumstances in which an injunction is available seem to suggest that decision's acceptance of the principle that equitable relief is the effective relief.

Protection of the Bargain.

Finally, the three decisions conform on the proposition that in a collective bargaining agreement the *quid-pro-quo* is the union's commitment not to strike for the employer's agreement to arbitrate. In *Boys Markets* the Court suggested that the employer's incentive is dissipated if it does not have an effective remedy for breach of the no-strike clause. It is deprived of its bargain.[12] *Gateway Coal* quotes this analysis from *Boys Markets.*[13] Accordingly, *Gateway Coal* implied a no-strike clause because of the presence of the agreement to arbitrate. And *Buffalo Forge* conforms to the prior decisions in this respect.[14] It discusses the *"quid-pro-quo"* factor and the employer's deprivation of its bargain and does not suggest that these are not genuine considerations. It is of course presumably self-evident that, from an employer's standpoint, the no-strike clause is what a collective bargaining agreement is all about. An employer agrees to wages and terms and conditions of employment to induce the union not to strike. Except for the no-strike clause, every provision of a collective bargaining agreement is a limitation of some sort on an employer's freedom of action in operating its business. It agrees to these limitations in order to obtain the no-strike clause.

In view of the foregoing, it appears that the Court deems that there is a national labor policy favoring arbitration rather than self-help; that the role of Norris-LaGuardia in regard to juris-

11. *Id.* at 382.
12. 398 U. S. at 248-49.
13. 414 U. S. at 382.
14. 428 U. S. at 407.

diction is to be judicially determined; that injunctive relief is the only genuine relief when a no-strike clause is violated; and that such a violation if unremedied destroys the bargain. *Buffalo Forge* itself embraces these concepts, but comes to a very different conclusion than the other cases. It is appropriate to consider the source of this different result in light of the otherwise common principles of the three cases.

Analysis of Buffalo Forge.

It is conceded that there is a factual difference between *Buffalo Forge* and its predecessor cases. Thus, the *Buffalo Forge* strike was a sympathy strike and was not a strike *over* a dispute as to the meaning of any provision of the contract other than the no-strike clause itself.[15] If it is the Court's intent to withdraw from the thrust and policy of *Boys Markets* and *Gateway Coal,* the sympathy strike fact can be used as a ground for such withdrawal. But, as has been said, the decision in *Buffalo Forge* does not on its face counsel a change in national policy. Indeed it restates that policy. Thus, to paraphrase the above-quoted dicta in *Buffalo Forge:*

1. There was an unrestricted no-strike clause.
2. There was an arbitration clause broad enough to reach issues as to the meaning of the no-strike clause itself.
3. Whether the sympathy strike violated the no-strike clause, and the appropriate remedies if it did, were subject to the arbitration provisions of the contract and were ultimately issues for the arbitrator.

And there was plenty of equity jurisdiction available in *Buffalo Forge:*

1. The employer was entitled to invoke the arbitration process to determine the legality of the sympathy strike

15. As pointed out in the dissenting opinion in *Buffalo Forge, Gateway Coal* establishes that the presence of such a strike "over" is not jurisdictionally essential, which conclusion is also expressly stated in the above-quoted extensive dicta from the decision in *Buffalo Forge.* 428 U. S. 413, n. 2.

and to obtain an injunction requiring the Union to arbitrate; and

2. In the event that the arbitrator found the sympathy strike illegal, the employer was entitled to an injunction to enforce the arbitrator's decision.

But, according to the decision, what the employer was not entitled to was an injunction against the strike pending the arbitrator's decision as to whether the strike was permissible under the no-strike clause. Thus, there is a gap surrounding the arbitration process.

The Foundation contends that this gap cannot be reconciled with the national policy that *Buffalo Forge* itself reiterates. This is so because if the parties' agreement against strikes and in behalf of arbitration is not protected pending the arbitration process, there will be no arbitration at all. Instead, with its plant shut down and without an effective remedy against the shutdown, the employer must accommodate itself to the self-help. The equity jurisdiction that *Buffalo Forge* offers becomes academic. The employer must resolve the strike on self-help terms, and the dispute does not reach the judicial enforcement point. Thus, in the course of the self-help, the national labor policy becomes meaningless. The parties' bargain is destroyed. This is the heart of the problem with *Buffalo Forge*. As a practical matter, it constitutes a significant contradiction of its own premises, premises that it shares with *Boys Markets* and *Gateway Coal*. *Buffalo Forge* represents an anomaly in the development of the national labor policy.

Buffalo Forge reaches its conclusion on several bases. It argues that the strike in that case "had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain."[16] The Foundation does not see how this can be, given the fact that there was an absolute no-strike clause and an inclusive agreement to arbitrate that reached the meaning of the no-strike clause, and given the

16. 428 U. S. at 408.

further fact that the employer had surely entered into the agreement in consideration of a protection against strikes during the agreement's term. *Buffalo Forge* also relies on an application of Norris-LaGuardia. But surely it is apparent that Norris-LaGuardia, as such, begs the question. *Buffalo Forge* and its predecessors pose the issue of accommodation of Norris-LaGuardia to national labor policy in view of the context of abuses against which it was directed when enacted and in view of the legislation since it was enacted. The Foundation contends that Norris-LaGuardia was not concerned with the *Buffalo Forge* facts: an unrestricted no strike clause; an arbitration clause that reached the issue of the meaning of the no-strike clause; and the arbitrability of whether the strike violated the no-strike clause. Finally, *Buffalo Forge* suggests that an injunction in that case would have drawn the courts into "any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions . . . and make the courts potential participants in a wide range of arbitrable disputes . . . not just for the purpose of enforcing promises to arbitrate . . . but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act."[17] The Foundation submits that this was not an inevitable or even likely consequence of an injunction in *Buffalo Forge*. This is so because *Buffalo Forge*, like any other decision, has meaning in the light of its facts. The facts of *Buffalo Forge* simply did not involve a range of alleged breaches of contract. On the contrary, as the decision itself states, *Buffalo Forge* was concerned with a strike, an unrestricted no-strike clause, an arbitration clause broad enough to reach the issue of the meaning of the no-strike clause itself, and an arbitrable issue of whether the strike violated the no-strike clause. It would seem that there would have been no difficulty in *Buffalo Forge*, and there would

17. *Id.* at 410-11.

be no difficulty in the instant case, in confining the precedent implications of the decision to the *Boys Markets* and *Gateway Coal* consideration of enforcing a no-strike and arbitration agreement.

CONCLUSION.

In *Buffalo Forge*, the parties contracted to prohibit all strikes and to arbitrate even the issue of the meaning of the no-strike clause and the legality of the *Buffalo Forge* sympathy strike. In the instant case, the Employer and the Union did these same things, and they made an express attempt to isolate a strike at Connersville from operations at Richmond. As related to the purposes of Norris-LaGuardia and the evils against which that statute was directed, it is gratuitous to conclude that this attempt to isolate was more advantageous to the Employer than to the Union. Strikes and the spreading of strikes are not necessarily to the benefit of a union or its members. A union may have as much at stake in agreeing to isolate a strike as the employer does.[18] Thus, the parties—both parties—to the instant contract agreed to such isolation unless the Employer took certain acts. The two parties then disagreed as to whether such acts had been taken by the Employer, and because of its view of the facts the Union struck.

In the above circumstances, the Court's initial description of the issue it was re-examining in *Boys Markets* applies directly to the instant case:

> (Whether) the Norris-LaGuardia Act preclude(s) a federal district court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement, even though that agreement contains provisions,

18. Indeed, in the instant case, the Union contended in the District Court that Section 10.2 of the collective bargaining agreement was inserted for the purpose of benefiting the Union. *See* the opinion of the district court, Petitioner's Appendix, p. A22.

> enforceable under Section 301(a) . . . for binding arbitration of the grievance dispute *concerning which the strike was called*. (emphasis added)

398 U. S. 237-38.

In *Boys Markets*, the Court answered this question in the negative.

On the assumption that *Buffalo Forge* is applicable to the instant case, it is requested that it be reconsidered. It is believed that such reconsideration will lead the Court to the same conclusion that was reached when *Boys Markets* was the vehicle for the reconsideration of *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962). It will be seen that *Buffalo Forge:*

> casts serious doubt upon the effective enforcement of a vital element of stable labor-management relations—arbitration agreements with their attendant no-strike obligations . . . (and) . . . does not make a viable contribution to federal labor policy.

398 U. S. at 249.

Respectfully submitted,

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